

NZS 3910:2023 | Top 10 things to know

February 2024

What do 1987, 1998, 2003, 2013 and 2023 all have in common? They are all years in which Standards New Zealand published a revision of NZ's most used standard form of construction contract, NZS 3910 Conditions of contract for building and civil engineering construction. Here are the top 10 things users of NZS 3910:2023 (2023 Standard) will need to know going forward.

1



Purpose

- The stated purpose of the development of the 2023 Standard is to ensure the contract is widely accepted and fit for purpose, limits the need for special conditions, improves understanding of contracts and that risk is allocated fairly.
- Overall, we agree the 2023 Standard heads in the right direction in terms of risk allocation and aligning the industry standard form with current market conditions. For example, the 2023 Standard includes greater real-time contract involvement between the parties including additional management plans, reporting, mutual early notification obligations, and prompt resolution of matters before disputes may arise.
- We anticipate that some parts of the 2023 Standard will receive further focus from principals, contractors and other users, including in the areas we've identified in this summary.

2



Engineer's role split

- The previous role of the "Engineer to Contract" has been split into two separate roles: (i) the Contract Administrator (CA); and (ii) the Independent Certifier (IC).
- The 2023 Standard does not require the CA and the IC to be different appointments – although we anticipate that for larger projects they will be.
- This new structure enables a clearer separation between decision making functions and contract administration responsibilities. However, we perceive that some principals will be conscious about whether the 2023 Standard has gone too far in terms of the manner in which the CA is required to act.
- A role for Advisers has been introduced, in place of the Engineer's Representative and assistants to the Engineer's Representatives. Advisers are engaged by the Principal to assist the IC and the CA.

3



Pricing

- For fixed lump sum contracts, the previous Variation entitlement for discrepancies in the Schedule of Prices is now limited to where a full schedule of quantities pricing document exists.
- A new pricing option of a "Target Price" has been included. The parties agree a target price and are able to agree to share cost savings or cost overruns if the actual price (calculated on a cost reimbursement basis) is above or below the target. We think there is room to improve the mechanics for the parties to finalise the end price at the conclusion of the works in order to achieve certainty for all.
- The Target Price is subject to adjustment for all Variations (including deemed Variations) unless otherwise stated in the Specific Conditions.
- It is now clear that the Contract Price can be made up of different pricing mechanisms such as target price, lump sum, measure and value and cost reimbursable. This is helpful.

4



Duty of Care

- A standard of care has been included that places a contractual obligation on the Contractor to carry out the Contract Works with "due care and diligence, in a proper and workman like manner with sound workmanship and Materials, safely and in accordance with good industry practice".
- This appears intended to reflect the common law position that a contractor must do the work with all proper skill and care and in a workmanlike manner. However, we question why this is a different standard to the Contractor's design requirements which require the Contractor to exercise "reasonable skill, care and diligence".

5



Provisional Sums

- All Provisional Sum works are now valued as a Variation - there is no distinction with work carried out by a Nominated Subcontractor. Above and below the line pricing needs to be cognisant of this change.
- Contractors may now claim a Variation where the scope of work covered by a Provisional Sum changes beyond what an experienced contractor could reasonably have foreseen at the time of tendering.
- This is one of two new Deemed Variations in the 2023 Standard.

6



Final Account

- New concepts of an "Interim Final Account" and a "Final Account" have been included. Together they are intended to confirm the final Contract Price with all variations and adjustments which are then reflected in the final payment claim.
- This regime is intended to facilitate certainty to both parties at the end of the project, so that the final payment process is not prolonged by negotiations of the final account.

7



Off-site Materials Agreement

- The form of agreement for off-site Materials in the 2023 Standard now attempts to create a security interest in respect of the relevant Materials that can be registered on the PPSR.
- However, the Guidelines state that parties may wish to seek legal advice to confirm that a security interest is created and is therefore enforceable. We agree that legal advice should be sought as we are not convinced of the effectiveness of this instrument.

8



Fault-based Contractor indemnities

- Contractor-indemnities are now fault-based.
- Principal indemnities no longer include an indemnity for losses arising out of the Principal's (or others who it is responsible for) acts or omissions.
- These are sensible changes.

9



Cap on Contractor's Liability

- A cap on the Contractor's liability (subject to exclusions) has been included as an "opt in" clause, so that its inclusion can be considered on a client / project-by-project basis. The level of any cap is also for the parties to agree.
- There is no indirect or consequential loss exclusion, which is common in other international standard form construction contracts.

10



Dispute Resolution

- There have been significant changes to the dispute resolution provisions, aiming to simplify the disputes regime generally.
- The first step in the disputes process is now negotiation between senior managers – however this would benefit from further clarity around timeframes and whether it is "encouraged" (as the Guidelines state) or mandatory.
- Arbitration remains the final forum for disputes, and it appears that there no longer needs to be a prior Engineer's (now IC's) Decision on the dispute before a party can refer the matter to arbitration. All disputes (including post completion defects disputes) are now able to be referred to arbitration.

MinterEllisonRuddWatts will be hosting training sessions on NZS 3910:2023 throughout 2024 and working with clients to develop precedent special conditions. If you would like to attend a training session or find out more, please contact one of our team or send an email to NZS39102023@minterellison.co.nz.